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Competency for What?

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RENDEZVOUS WITH REALITY

THE ULTIMATE
QUESTION FOR THE LAW
GOES BEYOND
“WHAT IS COMPETENCY?”
THE SPOT WE’RE IN
FORCES
THE QUESTION:
**COMPETENCY
FOR WHAT?**

Educators and practitioners are engaged in a debate in which suspicion of each other’s motives plays a large part.

The practitioners are angry that the law schools seem so unconcerned about the practical skills of their graduates; the law schools fear that the multiplication of requirements will rigidify the law curriculum and intrude into academic policy that should be governed by law faculty.

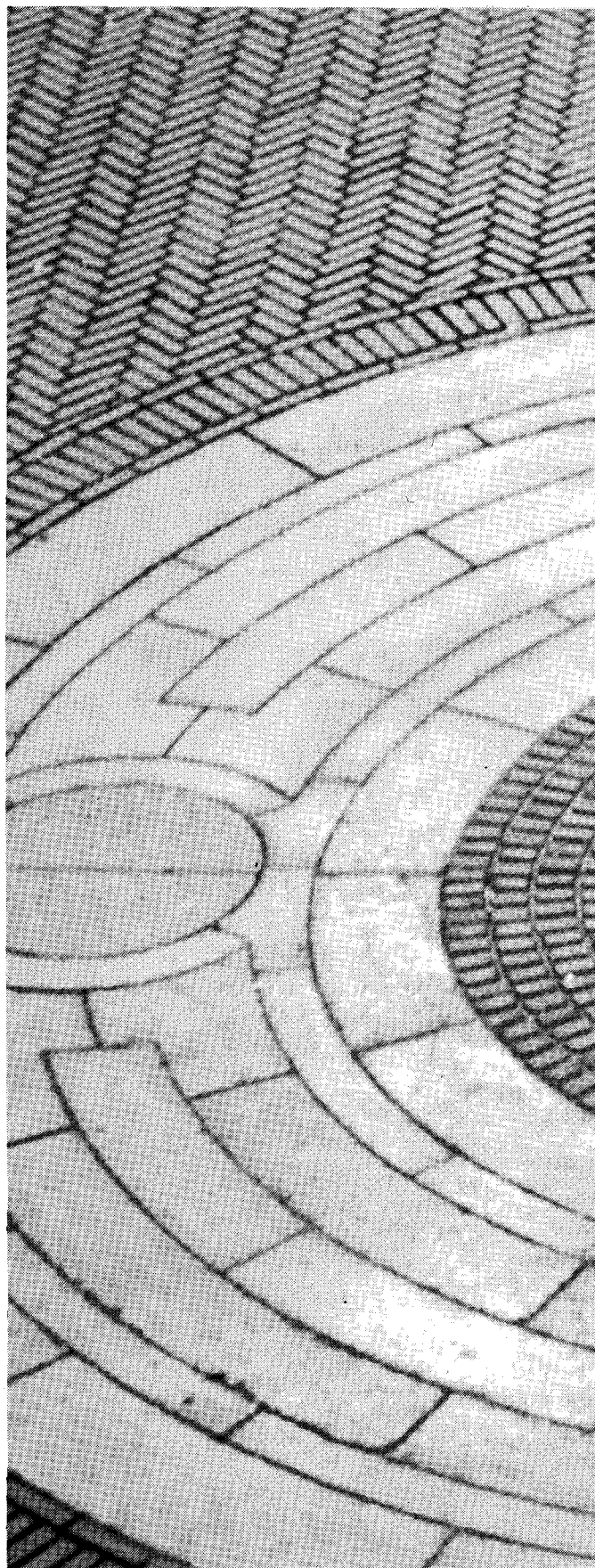
So long as we eye each other with suspicion, without addressing the underlying premises and the fundamental issues, the debate will continue to be unenlightening. How can both groups address themselves to the really serious questions: What do we mean when we talk of “lawyer competence?” Can we design reliable techniques for measuring the elements of “lawyer competence” once they are identified?

I must admit to a personal distaste for the vocational school tone of some of the rhetoric we have heard from practicing lawyers on this issue. Law school should not be viewed as a dull and boring obstacle course through which one has to pass in order to be admitted to the practice of law. Memorization of equitable maxims or the law of bailments for regurgitation on bar examinations cannot be the full story of law school. The life of the spirit that must be an important part of the process of legal education oozes out entirely in such an approach.

I was struck, in this connection, that during the entire time that eligibility requirements and lawyer competency were being discussed at the CLEPR workshop, there wasn’t a single reference to the ideas and values with which law schools and the legal order must

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be concerned. Throughout a very long day of discussion, the word "justice" wasn't mentioned even once!

What are law schools all about? Law schools should be concerned above all with central concepts such as power, order and justice. How can we achieve the minimum degree of order we need in society? How can we enhance the quality of justice in our society? How can we control and channel official power . . . and what do these words mean? Surely these questions are related to the qualities of a legal system and to the competence of the lawyers who work within it.

Thus, practitioners should not be surprised that the "nuts and bolts" quality of some of the discussion of lawyer competency gives rise to concern among academics, who fear an effort to convert educational institutions with multiple goals into trade schools with a single goal.

And, with fears and suspicions on both sides, we don't communicate well with each other. Until we can start talking with greater sophistication and humility about what we mean by lawyer competence and how we will measure it, I am afraid that our discourse will only increase the polarization of views that already exists.

EVALUATING CLEPR'S INFLUENCE

Let me now turn to a few observations concerning some significant changes, not generally noted, that are going on in legal education today. First, what about the progress of clinical legal education?

If the trustees of CLEPR took at face value the startling statistics of Gordon Gee (that less than three percent of student credit hours in American law schools involve clinical education) and the assessment of Bob Oliphant (that clinical educators are a small group of outsiders on American faculties who desire to move into traditional teaching roles of greater status), you might conclude that CLEPR's efforts to further the development of clinical education have been a waste of money. The time might as well have been spent in distributing copies of the Koran in the Bible Belt.

But you should not take these assessments at face value. The effect of the movement toward more reality in legal education, toward "learning by doing," can't be judged solely by the proportion of credit hours or of teachers devoted to clinical education. The attorney-client relationship has become much more central to all of legal education, even in courses that are not denominated as "clinical."

Moreover, CLEPR uses a definition of clinical that, because it requires dealing with a live client, is very narrow. Law students are increasingly exposed to exercises and simulations that provide them with lawyer skills of great consequence and practicality.

These techniques are forcing students to integrate the theory and doctrine of the intellectual side of law school with the real-world problems encountered by lawyers. The trends which have been fostered by CLEPR's efforts are winning widespread acceptance, despite the difficult resource problems that law schools face today.

The movement toward "learning by doing" in legal education is part of a process of planned change.

CLEPR has promoted it, every law faculty discusses it and curriculum and appointment decisions are made quite deliberately to provide increased opportunities for its integration into the law curriculum.

A PATTERN OF STEP BY STEP CHANGE

Meanwhile, however, a series of unplanned incremental changes in legal education are occurring, despite the lack of notice or publicity.

One important unplanned development is that law schools, especially those in metropolitan areas, are becoming part-time institutions after the first year. Data compiled at a number of law schools by Bob Stevens indicate very clearly that the energy and attention devoted to law study on the part of many students fall off very sharply in the second and third years.

Some of them, of course, are engaged in work experiences that are relevant to legal education such as law office research, judicial clerkships or legal work with government agencies. Even work as an insurance adjuster or court clerk can provide information and know-how that is valuable to the would-be lawyer. Perhaps the law schools have moved to an apprenticeship model without even knowing it.

The important point here is that this change is going on, that it has important consequences for legal education and that we know very little about it. Many law students are taking full-time programs but are delivering only part-time effort to their studies. Something has to give.

The second major unplanned change in legal education concerns the decline of the socratic method. The accepted folklore is that the socratic method comes close to being the only pedagogical technique in law school. That is not true, and it never was true. Some basic courses have always been taught by lecturers, and problem-method techniques have been used in advanced courses and seminars for many years.

But the relative sway of socratic teaching is diminishing and, in some schools, dialectical teaching all but disappears after the first year. We lack firm evidence, but the impressionistic report of many faculty members at a number of different law schools confirms this decline.

BUT IT JUST ISN'T DONE

An anecdote illustrates the trend. A younger faculty member at a fine law school, who opposes the socratic method himself because of the alleged anxiety it produces in law students, reported to me the result of a curriculum survey he had performed at his law school.

After sitting in a number of classes of different instructors and questioning a great many students, he reported that only one first-year teacher used the socratic method in its undiluted, old-fashioned form. A few others partially relied on it in a gentler form. Even more startling was his report that not a single teacher at the school used the socratic method in second- and third-year courses.

Support for his conclusions was evidenced by student reaction to a visitor from another law school

who attempted to use dialectical techniques in a large second-year course.

A petition signed by many members of the class and delivered by a substantial delegation informed him that such methods weren't used at the law school, and that it was an invasion of the students' privacy to expect them always to be prepared or to call on them in class. Many of them had jobs in the city and they were doing lots of other things; expecting them to be present and to respond to questions was an impairment of their personal and intellectual freedoms.

Apparently, the teacher's job is to be entertaining and interesting and to tell them what he knows about the subject matter of the course. The "paper chase" has become the "puffball chase."

This is an extreme picture and it is drawn so with a purpose. I know this anecdotal evidence doesn't establish the fact that a major and dramatic change in law school teaching methods has occurred. But I want to arouse you to think about the possibility that it has and to investigate the facts. Assume for the moment that I am right and ask why this change has occurred.

Three possible factors are worth mentioning. Frank Allen identified one when he talked about the loss of confidence on the part of law teachers. George Bunn reinforced the point. Law teachers are more uncertain today about what they are teaching and why, and the uncertainty carries over to teaching methods.

Second is the growth of consumerism in higher education. Students are more critical of the educational process and they communicate their views with considerable vigor. That is desirable—but why are faculties so responsive to the whims and fads of each class of students?

Faculty members used to resist student consumerism because they thought they knew what they were doing. Now, lacking that certainty, they tend to respond to student pressures which have existed for years: pressures to "lay it out" in an entertaining and easily absorbed fashion. And lecturing is what students are increasingly getting, day by day, in law schools all over the country.

Does this result in less analysis on the part of the students? Is the change compensated for by the higher average intelligence of today's law students? Has the change affected the tone and quality of legal education? I don't know the answers to these questions.

A third explanation may lie in changing student attitudes and characteristics. Law students today have quick intellects but their staying power in sustained analysis is often suspect. They are much more sensitive to questioning and tend to view a teacher's comments in a subjective and personal manner.

I have been astonished, for example, at the number of students who think teachers, by asking them questions or holding them to high standards, are engaged in an effort to humiliate them.

A generation ago, when we went to law school, how many of you thought that the advancement of understanding through the inductive learning of the questioning process was designed to embarrass or humiliate you? Yet that is a prevalent reaction today even to

dialectical discourse that is much more gentle than was characteristic of our time.

There is a fear, at least on the part of some of the crusty, socratic teachers I know, that the kind of hard-nosed, analytical and disciplined thinking which the best law schools used to pride themselves on teaching is no longer a shared experience of all law students. Some members of this diminishing fraternity of law teachers believe that now, more than ever, there is a question of the competency of many law students to handle fundamental analytical skills. They worry about the tendency of many students to become impatient with multi-faceted, many-layered legal problems and to want to leap to intuitive conclusions. If you push law students with a problem that requires sustained analysis, these law teachers report that "the response ain't what it used to be."

A TWILIGHT OF AUTHORITY

While I am in a gloomy and dyspeptic frame of mind, let me conclude with some remarks about the relationship of the law school to the general society. Trends in our society place great strain on the law and, at the same time, give it less credence. The old verities are gone and new ones have not taken their place.

The decline of the family and other informal institutions of value-inculcation and social control lead the public to place heavier emphasis on legal techniques to provide social direction and control. Yet the general deterioration of respect for authority undermines the ability of the law to command respect and obedience.

What is the proper role of law in a society in which instant gratification seems to be a major goal? Some years ago it was thought that there was a close relationship between public and private morality and between crime and sin.

Today the concept of sin has disappeared from sight; crime is viewed more as the responsibility of the society rather than of the individual. Society, by exposing individuals to unhealthy environments, is responsible for predisposing them toward criminal behavior, which is merely a form of social illness.

To the modern lawyer, the First Amendment comes closest to being the one remaining verity. That is a pretty slim foundation on which to build a moral community which is dependent upon commonly-held values.

Today the dilemma for the lawyer and the law school is not merely to define "What is competency?" There is also the question, "Competency for what?"

What kind of society do we want? What values and goals should the lawyer serve? In a society which is witness to the escalation of group conflict, we are sure to get more lawyers of the hired-gun variety who are better and better at stinging their opponents. I wonder whether law schools and the universities of which they are part do not need to penetrate the utilitarian and instrumental thinking that now totally pervades all of society, but especially higher education, and to ask more penetrating questions about values. We will escape our current confusion and malaise only if we redirect our moral compass and regain a sense of direction. 